(4)

No. 09-1143

In The
Supreme Court of the United States

LEE O. WILSON, JR., PETITIONER,

v.

GENE M. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. The Conflict Among Every Circuit Will Not Resolve Itself Absent This Court's Intervention

1. Respondents' so-called "recent" legal developments will not resolve the circuit split

Respondents agree that there is a deep split among all thirteen courts of appeals regarding whether the denial of appointment of counsel in a civil case is immediately appealable under the collateral order doctrine. Respondents also do not contend that any of the lower courts has questioned prior holdings or signaled that it may reverse course to resolve the split. It is thus not surprising that respondents concede that this "split [of authority] ordinarily might warrant this Court's review." Br. in Opp. 1.

Respondents' primary argument in opposition to certiorari is that this longstanding circuit split will simply resolve itself with the passage of yet more time. Br. in Opp. 3. They assert that "several recent decisions from this Court" will, in due time, cause the Fifth, Eighth, and Federal Circuits to reevaluate and reverse their holdings. Br. in Opp. 1.

The purportedly recent decisions on which respondents rely, however, are far from recent developments. Two of those cases—*Swint v. Chambers County Commission*, 514 U.S. 35 (1995), and *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863

(1994)—were decided 15 and 16 years ago, respectively. The third case, *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), did not modify the Court's collateral order jurisprudence in *Swint* and *Digital Equipment*, but rather simply reiterated it. Respondents also rely on a purportedly recent statutory change—an amendment to the Rules Enabling Act, 28 U.S.C. § 2071 et seq. Br. in Opp. 4. But that amendment occurred 20 years ago.

The courts that permit the immediate appeal of these orders have issued numerous decisions since these "recent" developments, yet no court has reconsidered its position in light of the authorities cited by respondents.[1] Indeed, during the intervening years, the split in authority has persisted and, in fact, deepened. If *Swint* and *Digital Equipment* were going to resolve the circuit split, it would have occurred long ago. The conflict among the circuits thus is not a "historical artifact," Br. in Opp. 3, but

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[1] The courts in *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984), and *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981), did not reconsider their holdings in light of the Rules Enabling Act amendment, *Swint*, or *Digital Equipment*, as respondents suggest. Br. in Opp. 8. Indeed, *Smith-Bey* and *Randle* were decided well before the Rules Enabling Act was amended in 1990. True, *Smith-Bey* and *Randle* did overrule prior circuit precedents in light of decisions from this Court. But those intervening decisions were truly recent, having occurred within the preceding year. *See Smith-Bey*, 741 F.2d at 26 (1984 case overruling precedent in light of 1984 Supreme Court decision); *Randle*, 664 F.2d at 1066 (1981 case overruling precedent in light of 1981 Supreme Court decision).

rather is an active, ongoing disagreement that will not simply resolve itself over time and that requires this Court's intervention. The petition should be granted on this basis alone.

2. ***This Court's rulings do not undermine lower court decisions permitting immediate appeals of orders denying appointment of counsel***

Nothing in *Swint*, *Mohawk*, or *Digital Equipment* changed the legal landscape in a way that would prompt the Fifth, Eighth, and Federal Circuits to revisit their holdings.

a. Contrary to respondents' suggestion, Br. in Opp. 4-5, this Court did *not* announce in *Swint* and *Mohawk* that under the Rules Enabling Act, rulemaking is now the *sole* method for determining whether an order is an appealable collateral order, and that courts are now precluded from making that determination under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Rather, this Court stated that "rulemaking, 'not expansion by court decision,' [is] the *preferred* means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 130 S. Ct. at 609 (emphasis added) (quoting *Swint*, 514 U.S. at 48). Because these decisions did not foreclose the possibility that additional classes of orders may be held to be immediately appealable, they are unlikely to prompt (and have not prompted with respect to *Swint*) the Fifth, Eighth, and Federal Circuits to reconsider their precedents.

Moreover, contrary to respondents' categorical rule based on the Rules Enabling Act, the Court in *Swint* and *Mohawk* did exactly what respondents argue the Rules Enabling Act forbids: the Court considered whether the orders at issue were immediately appealable under the three traditional *Cohen* elements. *See Mohawk*, 130 S. Ct. at 606 (holding that "collateral order appeals are not necessary" under the third *Cohen* prong "to ensure effective review of orders adverse to the attorney-client privilege"); *Swint*, 514 U.S. at 42 (concluding that order denying summary judgment is not appealable because it is not final under the first *Cohen* prong and not unreviewable under the third prong).[2]

Since the Rules Enabling Act was amended in 1990, this Court has six times granted certiorari to address whether various orders are immediately appealable. *Mohawk*, 130 S. Ct. 599; *Osborn v. Haley*, 549 U.S. 225 (2007); *Will v. Hallock*, 546 U.S. 345 (2006); *Swint*, 514 U.S. 35; *Digital Equipment*, 511 U.S. 863; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). And twice the Court has—in the absence of rulemaking—extended the collateral order doctrine to include new categories

[2] Indeed, respondents' arguments are identical to the reasoning of the opinion concurring and concurring in the judgment in *Mohawk*. *See Mohawk*, 130 S. Ct. at 610 (Thomas, J., concurring in part and concurring in the judgment) ("I would affirm * * * on the ground that any 'avenue for immediate appeal' * * * must be left to the 'rulemaking process.' * * * We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine * * * .")

of orders, including once just three years ago. *See Osborn*, 549 U.S. 225 (order denying certification and substitution under the Westfall Act appealable as collateral order); *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. 139 (order denying State's claim to Eleventh Amendment immunity immediately appealable).

b. *Digital Equipment* likewise will not cause the Fifth, Eighth, and Federal Circuits to reconsider their precedents, contrary to respondents' claim, Br. in Opp. 6-8. These courts have already had a decade and a half to consider that decision.

Nor are respondents correct that *Digital Equipment* "swept aside" part of the rationale of the lower courts' decisions—that under the third *Cohen* element, an order denying appointment of counsel is effectively unreviewable after entry of final judgment. Br. in Opp. 6. Far from eviscerating that element, *Digital Equipment* established only that "a party's ability to characterize a district court's [pretrial] decision as denying an irreparable 'right not to stand trial' altogether" is not alone sufficient to make the order effectively unreviewable after trial. 511 U.S. at 871. That accords with the Fifth, Eighth, and Federal Circuit's decisions, because a pro se plaintiff seeking appointment of counsel does not wish to *avoid* trial but rather to *have* a trial with assistance of counsel.

Respondents appear to read *Digital Equipment* as categorically rejecting any argument that any pretrial order is effectively unreviewable on appeal

from final judgment. But subsequent decisions from this Court have made clear that respondents' reading is mistaken. *See Osborn*, 549 U.S. at 238 (order denying certification and substitution under Westfall Act "would be effectively unreviewable later in the litigation"); *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144 (order denying sovereign immunity satisfies third *Cohen* element).

To be sure, as respondents point out, Br. in Opp. 7, the D.C. Circuit did rely on *Digital Equipment* in its decision not to permit immediate appeals of orders denying appointment of counsel. *See Ficken v. Alvarez*, 146 F.3d 978, 981-982 (D.C. Cir. 1998). But that only highlights the depth and intransigence of the split in the circuits and the need for this Court to step in and resolve it.

3. *The Fifth, Eighth, and Federal Circuits have given no signal that they may revisit their holdings*

As respondents concede, Br. in Opp. 8 n.4, long after *Swint*, the Fifth and Eighth Circuits have continued to hold fast to their precedents permitting pro se parties to immediately appeal orders denying appointment of counsel. There is simply no reason to believe that they will suddenly reverse course in the future.

The Fifth Circuit, just last year, heard an appeal from an order denying counsel, vacated the order, and remanded with instructions to appoint counsel. *Sanchez v. Chapman*, 352 Fed. App'x 955, 958 (5th

Cir. 2009) (per curiam). *See also Medrano v. Thomas*, 99 Fed. App'x 521 (5th Cir. 2004) (per curiam) (vacating, on immediate appeal, order denying appointment of counsel). Since Congress amended the Rules Enabling Act in 1990, the Fifth Circuit has heard no fewer than nine immediate appeals from denials of appointment of counsel, without any hint that it may reverse course. *Sanchez*, 352 Fed. App'x 955; *Walls v. Kahoe*, 328 Fed. App'x 959 (5th Cir. 2009) (per curiam); *Garnett v. Midland Police Dep't*, 338 Fed. App'x 445 (5th Cir. 2009) (per curiam); *Hale v. Harrison Cnty. Bd. of Supervisors*, 275 Fed. App'x 362 (5th Cir. 2008) (per curiam); *Buesgens v. Snow*, 169 Fed. App'x 869 (5th Cir. 2006) (per curiam); *Reed v. Johnson*, 130 Fed. App'x 664 (5th Cir. 2005) (per curiam); *Lewis v. City of Rogers*, 115 Fed. App'x 723 (5th Cir. 2004) (per curiam); *Medrano*, 99 Fed. App'x 512; *Douglas v. City of Baton Rouge*, 71 Fed. App'x 376 (5th Cir. 2003) (per curiam).

Similarly, the Eighth Circuit continues to hear immediate appeals from denials of motions to appoint counsel for pro se litigants in civil cases. *See, e.g.*, *Swackhamer v. Scott*, 276 Fed. App'x 544 (8th Cir. 2008) (per curiam); *Lane v. Astrue*, 279 Fed. App'x 421 (8th Cir. 2008) (per curiam); *Nelson v. Shuffman*, 476 F.3d 635 (8th Cir. 2007) (per curiam). The Federal Circuit likewise has not revisited its holding in *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988).

Respondents posit that the only reason these circuits have not yet overruled their longstanding

precedents is that they have not yet been asked to do so. Br. in Opp. 8 n.4. But that argument proves too much. If no litigant in the 20 years since the Rules Enabling Act's amendment has suggested that those precedents are no longer viable, then respondents' argument that a future litigant is likely to do so and that these courts are likely to overrule their well-established precedents simply has no traction. This Court should step in and resolve the split.

B. This Case Is An Ideal Vehicle To Resolve The Conflict Of Authority

Respondents do not contest that the question presented often evades this Court's review. As explained in the petition, all thirteen circuits have now decided the issue, which greatly diminishes the likelihood of its being squarely addressed in the future by a court of appeals. Moreover, pro se litigants whose interlocutory appeal of the denial of counsel is dismissed for lack of jurisdiction are unlikely to understand that that dismissal is reviewable by this Court. And in those cases where the court of appeals holds in an interlocutory appeal that counsel should be appointed, there is little incentive for the opposing party to seek this Court's review. Pet. 21. Accordingly, this case presents a rare, unique opportunity for this Court to intervene.

Instead, respondents attempt to portray this case as a poor vehicle. They assert that the district court's use of the phrase "at this time" indicates that the court may later decide to appoint counsel, possibly

mooting this case, and that the ultimate issue in this case—whether petitioner was incarcerated beyond his release date—has already been decided. Br. in Opp. 9-10. Respondents are wrong on both counts.

1. ***Respondents' argument that the denial of counsel would become moot if the district court were to appoint counsel later goes to the merits of the question presented rather than making this case a poor vehicle***

The fact that the district court used the phrase "at this time" in its order denying counsel, Pet. App. 4a, does not make this case any less worthy of certiorari. Rather, it simply goes to the finality of the order, which, on the merits, is the first element under *Cohen*, 337 U.S. at 546 (decision must "finally determine claim[ ] of right"). Thus, the impact of a phrase such as "at this time," and more generally the theoretical possibility of appointing counsel later in the case, is an issue for this Court to consider *after* the petition is granted, not a reason to deny certiorari.

Indeed, for the same reasons raised by respondents, there is conflicting authority regarding whether denial of a request for appointed counsel is conclusive under the first prong of *Cohen*. *Compare Holt v. Ford*, 862 F.2d 850, 852 (11th Cir. 1989) ("the denial of appointed counsel usually indicates 'nothing more than that the district court is not completely confident of the propriety of [court appointed counsel] *at that time*'" (brackets in original; emphasis added) (quoting *Gulfstream Aerospace Corp. v. Mayacamas*

Corp., 485 U.S. 271, 278 (1988)); *and Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762 (6th Cir.) ("orders denying appointment of counsel should be presumed tentative"), cert. denied, 474 U.S. 1036 (1985), *with Robbins v. Maggio*, 750 F.2d 405, 412 (5th Cir. 1985) (first *Cohen* element is met because "[i]f a defendant after denial of the motion chooses to go forward with his claim, he must do so without the assistance of appointed counsel"). That issue will be decided if this Court grants review.

Moreover, when a district court denies a pro se litigant's request for counsel, the litigant is forced to proceed on his own or abandon his case. That is true *even if* the court indicates that it may decide to appoint counsel later as the case progresses; the litigant is still exposed to the severe risks associated with litigating pro se. *See, e.g., Reynolds v. Cochran*, 365 U.S. 525, 532-533 (1961) ("[E]ven in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."). Even if the court appoints counsel once a case "reveals itself to be legally or factually more complex than the complaint had indicated," *Holt*, 862 F.2d at 852, it may be too late, as the pro se litigant may have already irreparably harmed his case. As petitioner's amicus explains, an inexperienced litigant proceeding pro se may inadvertently make admissions, reveal privileged information, or fail to pursue crucial discovery, any one of which might create an insurmountable advantage for the other side that cannot be remedied on appeal. *See* Amicus Br. of Alliance for Justice 5-6; Pet. 18-20.

2. *Respondents' arguments as to the merits of petitioner's claim are irrelevant*

Respondents also argue that petitioner's Section 1983 claim lacks merit, contending that he is bound by the Virginia Circuit Court's decision to dismiss petitioner's habeas petition, in which that court concluded that he was not incarcerated beyond his release date. Br. in Opp. 9-10.

Respondents' argument about the merits of petitioner's Section 1983 claim is beside the point. It goes only to the ultimate success of petitioner's claim and not to the procedural question presented here—whether petitioner may immediately appeal the denial of counsel. Indeed, the Fourth Circuit's decision demonstrates that it is a merits question irrelevant to the question presented. Pet. App. 9a n.2 ("Because the issue before us is limited to the legal question of whether Wilson's § 1983 claim is cognizable, we leave the issue of whether the Virginia Circuit Court's decision moots Wilson's claim for the district court to determine on remand."). If this Court grants review, it will not need to address the viability of petitioner's Section 1983 claim in light of the state habeas ruling.

In any event, petitioner has strong arguments that he is not bound by the prior state decision. Under Virginia law, collateral estoppel is inapplicable unless there is mutuality of the parties. *Scales v. Lewis*, 541 S.E.2d 899, 901 (Va. 2001). But the parties in petitioner's habeas case—the State and state officials in their official capacities—are not the

same as in this Section 1983 case—state officials in their individual capacities. *See Andrews v. Daw*, 201 F.3d 521, 526 (4th Cir. 2000) ("a government official in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata"); 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4458, at 571 (2d ed. 2002) ("an official who has litigated in his official capacity is not precluded from relitigation in his personal capacity"). Moreover, the fact that the state habeas ruling was based on two alternative grounds—both that petitioner's claim was procedurally barred and that it was "also without merit," 4th Cir. Dkt. (No. 07-6347) 68 at 8-9—will preclude the application of collateral estoppel here if the alternative ground is not "essential" to the ruling. *Glasco v. Ballard*, 452 S.E.2d 854, 855 (Va. 1995) (requirement for collateral estoppel is that issue "must have been essential to the prior judgment"); *cf.* 18 Wright, *supra*, § 4421, at 537-539 & n.1 (stating the analogous federal requirement).

More importantly respondents' argument demonstrates precisely why this Court should grant the petition. This case involves complex issues that would be confusing to most pro se litigants. The doctrines of res judicata and collateral estoppel involve multiple requirements that present difficult issues even for practitioners. Given the legal gauntlet that cases like this present for pro se litigants, the appointment of counsel can often be outcome determinative, and is thus of paramount importance.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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